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No. 15-1439

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IN THE

Supreme Court of the United States

CYAN, INC., ET AL.,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, ET AL.,

Respondents.

On Writ of Certiorari to the Court of Appeal of California for the First Appellate District

BRIEF OF *AMICUS CURIAE* NEW YORK STOCK EXCHANGE LLC SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether state courts lack subject-matter jurisdiction over "covered class actions," 15 U.S.C. § 77v(a), that allege only claims under the Securities Act of 1933.

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BRIEF OF *AMICUS CURIAE* NEW YORK STOCK EXCHANGE LLC SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae New York Stock Exchange LLC ("NYSE"), along with its affiliated exchanges NYSE American LLC and NYSE Arca, Inc., together comprise the largest equity securities exchange group in the world. NYSE provides the leading global marketplace in which public companies are able to raise equity capital. It has been the listing venue for nine of the ten largest initial

[1] Petitioners' and Respondents' counsel of record consented to the filing of this brief by filing a blanket consent with the Clerk. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or their counsel, have made a monetary contribution to the preparation or submission of this brief.

public offerings ("IPOs") to date (including the single largest IPO) and all of the last 28 operating company IPOs that exceeded $700 million in size. See NYSE, *NYSE 2016 Year in Review* (2017).[2] NYSE-listed companies comprise 87% of the companies in the Dow Jones Industrial Average, 77% of the S&P 500, and 80% of the Fortune 100. *Ibid.* Due to its prominent and long-established position within the securities industry, NYSE has a unique interest in maintaining robust and competitive U.S. equity capital markets.

The Private Securities Litigation Reform Act of 1995 ("PSLRA") and Securities Litigation Uniform Standards Act of 1998 ("SLUSA") were designed to curtail abusive securities litigation that Congress deemed a threat to the attractiveness, competitiveness, and functionality of the U.S. equity capital markets. To enhance the effectiveness of the various reforms and safeguards included in those statutes, Congress dictated that specified types of securities class actions (including this one) would be litigated in *federal* courts under uniform *federal* standards.

Some lower courts, however, have created a loophole that allows plaintiffs to evade the PSLRA's uniform federal standards by filing class actions under the Securities Act of 1933 ("1933 Act") in state courts. Compounding this problem, identical lawsuits are often brought in state and federal courts by different plaintiffs asserting the same claims against the same defendants. Sometimes this happens simultaneously, but sometimes a state-court proceeding is filed even after federal proceedings have substantially progressed under the procedures prescribed by Congress.

The current litigation landscape risks a return to the era of unchecked abuses that preceded the reforms enacted through the PSLRA and SLUSA. Failure to en-

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[2] https://www.nyse.com/2016-year-in-review.

force these key reforms could dissuade companies from considering new or continued listings in the U.S., motivating them to turn to foreign equity capital markets or remain privately held. All participants in the U.S. equity capital markets lose in that situation. After all, robust U.S. equity capital markets offer the best access to funding in the world, while providing unmatched transparency and information to the investing public. Encouraging companies to list on U.S. equity exchanges thus helps both companies (by giving them access to capital) and investors (by expanding their investment opportunities). And the resulting efficient flow of capital to domestic markets—as well as the increased competition among companies for investors' capital—is a critical ingredient for continued U.S. economic growth.

NYSE believes these benefits are extremely important to maintaining the worldwide preeminence of U.S. equity capital markets. It thus has a distinct interest in advocating for judicial clarification of the intended scope of the fundamental reforms enacted by the PSLRA and SLUSA, such as channeling all covered class actions—including those under the 1933 Act—into federal courts to be litigated under uniform federal procedures.

SUMMARY OF ARGUMENT

Congress enacted the PSLRA to solve a specific problem—the rampant use of abusive litigation tactics in securities class actions. The securities plaintiffs' bar reacted by, among other things, filing lawsuits under the 1933 Act in state courts, where they exploited looser and (by definition) highly diverse procedures to once again extract a high cost with meritless litigation. These state-court actions were possible because, even after the PSLRA was enacted, the 1933 Act permitted claims brought under it to be filed in both state and federal courts and precluded removal of cases that were filed in state courts.

For these and other reasons, Congress passed SLUSA to address that precise problem by prohibiting state-court end-runs around the PSLRA's reforms. After SLUSA, securities plaintiffs should no longer have been able to file covered class actions asserting 1933 Act claims in state court or force the remand of such cases after removal by defendants. But confusion in the state and federal courts has resulted in the state-court loophole remaining open and the important promise of the PSLRA remaining unfulfilled.

The persistence of this problem hurts U.S. equity markets. The United States is the preeminent destination for raising equity capital, but the litigation risk that companies must endure to access capital through U.S. markets remains a deterrent to companies considering a U.S. listing. Companies have other options—including foreign capital markets or private financing—and those options may appear more attractive as perceived and actual risks of abusive securities litigation increase.

The resulting effect on capital markets hurts both investors and the economy. The U.S. equity capital markets deliver unparalleled transparency and standardization to investors, ensuring that they are armed with reliable information to guide their investment choices. The more companies that list on U.S. exchanges, the more investors benefit from these safeguards, allowing for informed investment decisions. The U.S. economy also benefits from maximal participation in U.S. equity capital markets, as those markets fulfill the critical role of directing the efficient flow of capital in a complex economic landscape.

Congress understood all of this when it passed the PSLRA and SLUSA. Indeed, protecting U.S. equity capital markets is one reason Congress enacted those reforms. The Court should give effect to Congressional in-

tent and enforce Congress' efforts to close the state-court loophole through the PSLRA's protections.

ARGUMENT

I. PERMITTING STATE-COURT LITIGATION OF COVERED CLASS ACTIONS UNDER THE 1933 ACT ERODES THE PSLRA'S PROTECTIONS AND THEREBY HARMS INVESTORS, COMPANIES, AND THE U.S. ECONOMY

SLUSA aimed to bolster the PSLRA's reforms by channeling all covered class actions into federal courts, where they would be litigated under the PSLRA's uniform federal procedures. Some courts nonetheless blessed attempts by plaintiffs' lawyers to file covered class actions under the 1933 Act in *state* courts. This court-created workaround has undermined the clear statutory framework Congress crafted to secure exclusive federal jurisdiction over 1933 Act covered class actions. The resulting quandary is not merely an esoteric jurisdictional question. Indeed, allowing 1933 Act covered class actions to proceed in state courts, where they evade the PSLRA's reforms, engenders the same type of abusive litigation the PSLRA and SLUSA sought to prohibit. And that has profound follow-on effects for investors, U.S. equity capital markets, and the U.S. economy writ large. Fortunately, the Court can forestall those harms by interpreting SLUSA as written, thus fulfilling the promise of Congress' landmark legal reforms.

A. The court-created loophole in SLUSA's grant of exclusive federal jurisdiction undermines the PSLRA's protections

1. *Courts' failure to enforce SLUSA has created an end-run around the PSLRA's protections*

In 1995, Congress enacted the PSLRA to combat the "rampant" rise in "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom

they purportedly represent.'" *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Conf. Rep. No. 104-369, at 31 (1995)). That landmark legislation contains a number of reforms "to curb these perceived abuses." *Ibid.* Among other things, the PSLRA mandates an automatic stay of discovery while a motion to dismiss is pending, limits recovery of attorney's fees and expenses, sets criteria for selection of lead plaintiffs and their counsel, and vests control of litigation in the court-appointed lead plaintiffs whose compensation may not exceed that of the class members they are appointed to represent. See 15 U.S.C. § 77z-1; *Dabit*, 547 U.S. at 81. These reforms not only curtailed the worst of the incentives driving plaintiffs' counsel and empowered defendants to quickly dispose of meritless cases without the expense of protracted discovery, they created a well-defined system for ensuring that securities litigation would be controlled by the investors it is intended to benefit. In this way, the PSLRA targeted the most abusive aspects of securities litigation while guaranteeing that meritorious claims would still be heard.

The PSLRA proved to be a victim of its own success, however, because it had an "unintended consequence: It prompted * * * some members of the plaintiffs' bar to avoid the federal forum altogether * * * [and] bring[] class actions * * * in state court." *Dabit*, 547 U.S. at 82. That development undermined the core of the PSLRA, as many of its most important reforms—including the automatic stay of discovery and the mechanism for selecting lead plaintiffs and lead counsel—do not apply to actions brought in state court. See H.R. Conf. Rep. No. 105-803, at 14 (1998) (noting the trend of "plaintiffs resort[ing] to state court to avoid the new, more stringent requirements of [the PSLRA in] federal cases"). In addition, plaintiffs were able to fragment cases by bringing substantively identical lawsuits in both state and federal

court. So long as plaintiffs avoided pleading claims under the 1934 Act—which mandates exclusive federal jurisdiction—they could defeat attempts to consolidate the lawsuits in a single federal court and thwart the PSLRA's grant of control to lead plaintiffs selected according to its criteria.

To stem this "'shift[t] from Federal to State courts' and 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of' the [PSLRA], Congress enacted SLUSA." *Dabit*, 547 U.S. at 82. SLUSA employed a three-pronged approach to stop this flight to state court: It eliminated state-court jurisdiction over class actions alleging claims under the 1933 Act, granted federal courts removal jurisdiction over such cases, and precluded most class actions alleging state-law securities claims. 15 U.S.C. §§ 77v, 77p.[3]

That simple solution should have fixed the problem and restored uniform, federal standards to securities class actions. But multiple federal and state courts have failed to enforce SLUSA's jurisdictional modification with respect to 1933 Act covered class actions. They have instead permitted state courts to retain jurisdiction over those actions. See, *e.g.*, *Harper* v. *Smart Techs. Inc.*, No. C 11-5232 SBA, 2012 WL 12505217, at *1 (N.D. Cal. Sept. 28, 2012) (remanding based on finding of no removal jurisdiction under SLUSA); *Luther* v. *Countrywide Fin. Corp.*, 195 Cal. App. 4th 789, 797 (2011) (finding subject-matter jurisdiction despite SLUSA).

That judicial abrogation of SLUSA means that savvy plaintiffs' counsel can evade the PSLRA reforms by bringing covered class actions asserting 1933 Act claims

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[3] Significantly, neither the PSLRA nor SLUSA barred anyone from filing federal securities-law claims; rather, SLUSA simply changed *where* some such claims could be filed.

in state courts and defeating efforts to remove them to federal courts. Indeed, not only can plaintiffs avoid PSLRA procedures, they can escape the federal-court supervision of securities class actions that Congress intended. For example, even if a federal court has appointed lead plaintiffs and lead counsel pursuant to the PSLRA's guidelines, a different plaintiffs' counsel and lead plaintiffs could proceed independently by filing a substantively identical case in state court. This now-common scenario thwarts Congress' goal of centralizing complete control over a securities lawsuit in the lead plaintiffs and lead counsel appointed by federal courts under the PSLRA's requirements.

In a state forum, the PSLRA cannot prevent the abusive practices of "nuisance filings, targeting of deep-pocket defendants, vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent.'" *Dabit*, 547 U.S. at 81 (quoting H.R. Conf. Rep. No. 104-369, at 31 (1995)). Plaintiffs in state courts can take advantage of more lenient state-court class-certification and discovery procedures to extort settlements in weak cases. Equally troubling, defendants now can be forced to litigate the same claims in both state and federal courts at the same time or, worse still, litigate claims in state court that have already been dismissed in federal court. When courts mistakenly hold that covered class actions filed in state court are not removable, they effectively prevent such actions from being consolidated with cases filed in federal courts. In these instances, the state-court litigation directly interferes with the litigation proceeding in federal court notwithstanding the PSLRA and SLUSA.

2. *Plaintiffs and their counsel exploit this loophole to subject listed companies to abusive and duplicative litigation*

The problems discussed above are not theoretical. Plaintiffs and their counsel have discovered this court-created loophole and exploited it to both circumvent the PSLRA's requirements and, in certain instances, directly evade federal-court orders issued pursuant to the PSLRA. California state courts have been ground zero for this trend. In 2011, the year that *Countrywide* opened up California state courts to 1933 Act class actions, only three 1933 Act class actions were filed in California. That number had quintupled by 2015 (in which plaintiffs filed 15 new 1933 Act class actions in California state courts) and further increased by 2016 (in which plaintiffs filed 18 more new such class actions in the state). Cornerstone Research, *Securities Class Actions Filings—2017 Midyear Assessment*, at 12 (2017).[4] If the Court does not reverse the decision below, this trend will accelerate and spread nationwide—and the PSLRA's protections will be reduced to mere paper promises.

An additional negative by-product is the explosion of instances in which defendants must simultaneously fight the same lawsuits in federal and state courts, but cannot centralize or consolidate them (as they could with 1934 Act claims by utilizing the federal transfer and multi-district litigation procedures). In 2011, there was only one instance of a parallel state and federal Section 11 filing. *Id.* at 14. That number shot up to six by 2016. *Ibid.* This trend, too, shows no signs of abating.

Such duplicative parallel litigation is costly and frustrating for companies and a waste of scarce judicial resources. Defendants must spend significantly more time

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[4] https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2017-Midyear-Assessment.pdf.

and expense to defend themselves in multiple fora, and multiple courts must expend efforts adjudicating the same claims. This not only guts Congress' attempt to consolidate securities class actions under one set of rules, it also harms shareholders, who ultimately foot the bill for defense costs in duplicative lawsuits. See Coffee, *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 Colum. L. Rev. 1534, 1536 (2006) ("[B]ecause the costs of securities class actions—both the settlement payments and the litigation expenses of both sides—fall largely on the defendant corporation, its shareholders ultimately bear these costs indirectly and often inequitably.").[5]

One early example of the problems created by this system is the parallel 1933 Act litigation against Smart Technologies and other defendants involved in its IPO. In January 2011, a putative 1933 Act class action was filed in federal court against those defendants. See *McKenna* v. *Smart Techs. Inc.*, 1:11-cv-7613-KBF, 2012 WL 1131935, at *7 (S.D.N.Y. Apr. 3, 2012). That litigation progressed for months under the PSLRA's procedures, and the court duly appointed a lead plaintiff and lead counsel to control the litigation. *Ibid.* The court-appointed lead plaintiff determined that the underwriters were not necessary parties, and they were dismissed from the litigation. See *McKenna*, 1:11-cv-7613-KBF, Docket Nos. 71 & 81.

Then, eight months into the case, another group of plaintiffs filed a copycat class action against the same defendants—including the underwriters—in California state court. See *Harper*, 2012 WL 12505217, at *1. The

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[5] Duplicative state-court litigation risks harming shareholders with meritorious claims, because settlements of such claims are often funded in whole or in part by directors and officers liability insurance policies, and all litigation costs erode the amounts available to pay claims.

defendants removed the case and sought a transfer to facilitate consolidation with the federal class action (*McKenna*). But the district court remanded the case, incorrectly holding that it lacked removal jurisdiction under SLUSA. *Id.* at *5.

Because that remand decision was not reviewable, the defendants were forced to defend claims arising out of the same IPO in two different fora and under two different sets of rules. That result was especially unfair to the underwriter defendants, as they were forced to face claims in state court that had been dismissed in federal court by the lead plaintiff appointed pursuant to the PSLRA.[6] Even more remarkably, when the court-appointed lead plaintiff settled the claims that survived dispositive motions in federal court, the state-court plaintiffs objected to that settlement and their counsel sought fees in federal court, claiming that the improper state-court action had materially contributed to the settlement. See *McKenna*, 1:11-cv-7613-KBF, Docket Nos. 185, 197, 201 at 23:5-49:9, & 203.

If the California federal court in *Harper* had properly enforced SLUSA, none of this would have happened. The procedures for transfer, consolidation, and multi-district litigation exist to avoid just this type of duplicative parallel litigation, with its attendant inequities and inefficiencies. But, much like the PSLRA's protections, their reach does not extend to state courts. Until SLUSA's promise of uniform, federal control over national securities litigation is fulfilled, defendants will continue to face the unwelcome prospect of parallel litigation

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[6] The defendants had also secured federal-court dismissal of various other claims by the time of the remand decision, but the state-court plaintiffs reasserted those claims as well. See *McKenna*, 2012 WL 1131935, at *13, 17-22 (granting defendants' motion to dismiss in part); *McKenna*, 1:11-cv-7613-KBF, Docket Nos. 109 & 201 at 36:21-23 (discussing assertion of dismissed claims in state-court action).

in multiple fora on the same claims. This Court has once before rejected a construction of SLUSA that "would give rise to wasteful, duplicative litigation." *Dabit*, 547 U.S. at 86. It should do the same here.

B. In NYSE's experience, weakening the PSLRA's protections lessens the attractiveness and strength of the U.S. capital markets

This end-run around the PSLRA's safeguards not only harms listed companies and their shareholders, but also acts as a brake on the growth of U.S. equity capital markets. Although U.S. equity capital markets offer unequalled advantages to companies seeking financing, they are not companies' only option. It is well-established that companies often remain private and accept the attendant financing and liquidity costs as the price for avoiding the litigation risks associated with accessing the U.S. public capital markets. See H.R. Rep. No. 104-50, at 19 (1995) ("Some companies may decide not to go public. In this way, they can avoid possible liability but only by incurring the costs associated with more expensive private financing.") (quoting Testimony of Professor Daniel R. Fischel before the House Subcomm. on Telecomm. and Fin., Hearings on H.R. 10, at 5-6 (Jan. 19, 1995)). Companies can also turn to foreign capital markets, which have different regulatory and litigation regimes and are outside the reach of key U.S. securities laws. See Ernst & Young, *IPO Insights: Comparing Global Stock Exchanges* (2009)[7] (discussing the competition among equity exchanges across the globe); *Morrison* v. *Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 267-268 (2010) ("[I]t is in our view only transactions in securities listed on domestic exchanges, and domestic transactions

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[7] http://www.ey.com/Publication/vwLUAssets/IPO_Insights:_Comparing_global_stock_exchanges/$FILE/IPO_comparingglobalstockexchanges.pdf.

in other securities, to which § 10(b) applies. * * * The same focus on domestic transactions is evident in the Securities Act of 1933 * * * ."); Brodsky & Adamski, Law of Corporate Officers and Directors: Rights, Duties and Liabilities, § 12:4. Extraterritorial reach (2016) ("Although *Morrison* involved only 1934 Act claims, courts have held that *Morrison* also applies to claims under the Securities Act of 1933.").

These risks to the continued prosperity of U.S. equity capital markets motivated the passage of the PSLRA and remain relevant today. See H.R. Rep. No. 104-50, at 20 (1995) ("Fear of litigation keeps companies out of the capital markets."). Indeed, "international observers increasingly cite the U.S. legal and regulatory environment as a critical factor discouraging companies and other market participants from accessing the U.S. markets." Commission on the Regulation of U.S. Capital Markets in the 21st Century, Report and Recommendations 30 (2007).[8]

The failure to apply SLUSA as written has inflated the litigation risk factor for those considering accessing the U.S. capital markets. NYSE staff who interact with companies considering whether to list on NYSE (or a competitor U.S. exchange) are intimately familiar with these concerns. They report that, even after SLUSA was enacted, the burdens of abusive shareholder litigation remain a substantial consideration for companies evaluating whether to list their securities on a U.S. exchange. This concern is not limited to domestic companies; it also applies prominently to foreign companies, many of which have decided not to list in the U.S. after expressing these concerns.

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[8] https://www.uschamber.com/sites/default/files/legacy/reports/0703capmarkets_full.pdf.

Congress set out to "deter or at least quickly dispose of those suits whose nuisance value outweighs their merits," *Dabit*, 547 U.S. at 83, thus aiding investors and incentivizing prospective listing companies to enter U.S. equity markets. But some courts' failure to properly apply SLUSA has hampered Congress' efforts and contributed to the United States' lingering reputation for abusive securities litigation. That has caused—and will continue to cause—a negative impact on the global competitiveness of the U.S. equity capital markets.

C. Abusive litigation harms investors, companies, and the U.S. economy

The only people who potentially benefit from the current state of affairs are plaintiffs with weak cases and their counsel, who typically are unlikely to secure appointment as lead plaintiffs and lead counsel under the PSLRA's requirements.

Everyone else loses. Plaintiffs with meritorious cases are no worse off under the PSLRA's safeguards, which merely promote proper and efficient litigation of securities class actions. As long as plaintiffs' claims are legitimate, they have nothing to fear from operating under the PSLRA's uniform, federal procedures.[9]

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[9] An express purpose of the PSLRA was to discourage the filing of weaker claims. One way to assess achievement of that goal is by examining settlement trends since 1995. Average settlement values of securities class actions increased after the PSLRA was enacted, which suggests that overall fewer weaker claims are being filed than before the PSLRA was enacted. See Buckberg et al, *Recent Trends in Shareholder Class Action Litigation: Bear Market Cases Bring Big Settlements* (NERA Economic Consulting Feb. 2005); Buckberg et al., *Recent Trends in Securities Class Action Litigation: 2003 Update* (NERA Economic Consulting Feb. 2004); Stanford Law School, Securities Class Action Clearinghouse, *Federal Securities Class Action Cases Filed and Defendant Market Cap Losses Surge in 2001* (Mar. 15, 2002); Cornerstone Research, *Securities Class Action Case Filings—2004: A Year in Review* (2005); Cornerstone Re-

Companies listed on a U.S. exchange are particularly harmed under the current regime. Listed companies that placed their faith in the U.S. equity capital markets are penalized for that choice by increased exposure to abusive litigation in unpredictable, multiple fora. Companies that opt to avoid a U.S. listing may escape the litigation risk, but must seek capital in foreign markets or through more expensive private sources of capital.

Investors are harmed as well. U.S. equity capital markets offer significant advantages to investors. The rules that govern those markets ensure an unmatched level of transparency and standardization in corporate reporting, structure, and operation. See Stier, National Bureau of Economic Advisors, *What Makes Foreign Firms Attractive to U.S. Investors?* (2007)[10] (observing that "U.S. exchange[s] * * * require[] more rigorous accounting and other mandated disclosures" than foreign markets).

The 1934 Act, for example, prohibits the SEC from registering an exchange unless

> [t]he rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove imped-

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search, *Securities Class Action Case Filings—2003: A Year in Review* (2004); Cornerstone Research, *Securities Class Action Case Filings—2002: A Year in Review* (2003); Cornerstone Research, *Securities Class Action Case Filings—2001: A Year in Review* (2002); Simmons & Ryan, *Post-Reform Act Securities Case Settlements—Cases Reported Through December 2002* (2003); Simmons & Ryan, *Post-Reform Act Securities Lawsuits—Settlements Reported Through December 2003* (2004).

[10] http://www.nber.org/digest/apr07/w12500.html.

> iments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest * * * .

15 U.S.C. § 78f(b)(5).

The NYSE Listed Company Manual[11] contains many SEC-approved rules that advance those pro-investor purposes. Section 303A.01, for example, requires listed companies to have a majority of independent directors in order to "increase the quality of board oversight and lessen the possibility of damaging conflicts of interest." Similarly, Section 303A.10 provides that "[l]isted companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, and promptly disclose any waivers of the code for directors or executive officers." And Section 312.03 requires shareholder approval for issuing securities in most circumstances.

Investors benefit from the transparency and good business practices these rules foster. Investors are empowered to make informed investment decisions, based on standardized rules and disclosure requirements, about where to direct their capital, which encourages investment capital to flow to its highest and best uses. NYSE believes these advantages are maximized when companies choose to list on U.S. exchanges.

By contrast, the broader U.S. economy suffers when abusive securities litigation is allowed to flourish in state courts. The enormous size of the capital-market industry, measured by the amount of capital raised and number of people employed, is only part of the picture. The real strength of the U.S. equity capital markets is their ability to efficiently direct the flow of capital in a highly complex economy. The same transparency and standard-

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[11] http://wallstreet.cch.com/LCM/.

ization that benefits investors enables the U.S. equity capital markets to optimally perform this crucial role. The fewer companies that choose to publicly list, however, the less efficient this capital-directing system becomes, because it will contain less overall information about the companies that make up the economy. Moreover, because of the impediments to investing in non-listed companies (including the relative lesser transparency of their operations), inefficiencies in the flow of capital result when companies forego public listing. In sum, any disincentive for a company to list on the U.S. equity capital markets reduces the efficiency of the capital-directing mechanism that forms a central part of a healthy U.S. economy. Although NYSE acknowledges the importance of affording legal remedies to parties with meritorious claims, the abusive, duplicative litigation targeted by the PSLRA and SLUSA brings only economic harm with no countervailing benefits.

II. The Court Should Address SLUSA's Removal Provision To Ensure The Efficacy Of Its Ruling

This case most directly presents the question of whether state courts may exercise jurisdiction over 1933 Act covered class actions. That framing is an artifact of the somewhat unusual procedural posture of this case, where the defendants moved to dismiss on jurisdictional grounds rather than removing the case to federal court. See Pet. App. 1a-6a.

Although the state-court jurisdictional question is important, its resolution would not definitively resolve the split among the lower federal courts. To do that, the Court must also decide the closely related issue of whether SLUSA grants federal courts removal jurisdiction over covered class actions under the 1933 Act. That is the stumbling block in many of these cases, including the Smart Technologies litigation discussed earlier. The

Court should therefore address the removal-jurisdiction question to ensure the efficacy of its ruling.

The need for this guidance would be especially acute if the Court were to adopt the position of the United States and hold that state courts may exercise jurisdiction over 1933 Act class actions. If the Court were to follow that path, it should likewise accept the United States' advice to reach the removal question and confirm that 1933 Act class actions are indeed removable under SLUSA. Remaining silent on the issue would risk the indefinite reign of abusive tactics and parallel litigation in securities class actions. Because orders granting remand are generally unappealable, see *Kircher* v. *Putnam Funds Tr.*, 547 U.S. 633, 648 (2006), the Court should take this opportunity to decide the removal question. That will allow the lower "courts [to] benefit from straightforward [jurisdictional] rules under which they can readily assure themselves of their power to hear a case." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010).

There are no obstacles to the Court addressing the removal question here. As both Petitioners (at 16-20) and the United States (Petition-Stage Br. 13-17) explain in detail, the answers to the state-court jurisdiction and removal-jurisdiction questions are inextricably intertwined under SLUSA. Accordingly, even if the Court were to reject Petitioners' position as to state-court jurisdiction, the Court should address the removal question as part of interpreting the relevant SLUSA provisions in their statutory context. See *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 579 n.4 (2008) ("Since the question presented cannot genuinely be answered without addressing the subsidiary question, we have no difficulty concluding that the latter question is 'fairly included' within the former."); *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering

the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). NYSE urges the Court to resolve the removal question and eliminate the legal instability that could otherwise plague litigants and market participants alike.

CONCLUSION

NYSE respectfully requests that the judgment of the Court of Appeal be reversed.

Respectfully submitted.

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